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# Kluwer Patent Blog

## Report from the Fordham Conference (1)

Brian Cordery (Bristows) · Friday, April 1st, 2016

For 2016, the Fordham Conference has returned to its home on the Upper West side of Manhattan. In the meantime, the Institute has been rebuilt and the shabby-chic has been replaced with a state of the art new facility.

The sun shone on your author (both figuratively and literally) this morning as the programme compilers had seen fit to table a copyright session at the start of the day which allowed many patent enthusiasts (including this one) the opportunity to shake off the jet lag with a trot around Central Park.

The first patent session of the day, at a very respectable 0950, was entitled: “Outstanding Legal Issues and Challenges” and naturally enough, there was a certain degree of gloominess expressed by certain members of the distinguished panel. However, despite the challenges that lie ahead as the UPC enters into the home straight before its implementation (particularly as regards SPCs, national validations, prior national rights and double-protection), Margot Frohlinger, the Principal Director, Patent Law and Multilateral Affairs at the EPO seemed relatively positive about the road ahead for the UPC. John Alty, the Chief Executive of the UKIPO, updated the conference on the progress made towards the international harmonisation of patent laws which, he noted, is crucial to SMEs. Kathleen O’Malley, a Judge of the Court of Appeals for the Federal Circuit observed that the landscape for her Court has changed dramatically since the introduction of the AIA and that the recent increased interest of the Supreme Court in patent cases has brought its own set of challenges to the Federal Circuit.

The final speaker, David Kappos used his slot to throw down the gauntlet to the next US administration in the form of 10 separate objectives with the common theme that in the modern world the US government must recognise, respect, reward and protect all aspects of innovation.

The afternoon session began with a discussion with remedies for patent infringement in the US. Carey Ramos noted that, post E-Bay, permanent injunctions are less commonly granted by US Courts although they are still awarded in 70%+ of cases. The chances of securing an injunction also depends on the industry sector and whether the patentee is a practising entity or not. Carey summarised the Apple v Samsung saga and concluded that whether patentees could get a permanent injunction in the US was up in the air at the moment. It is possible that some of the Federal Circuit judges are still dissatisfied with E-Bay.

Robert Goldman took the audience through the basics of calculation compensation under US law and the Geogia-Pacific guidelines which used to be relied on heavily to provide a framework to the

statute. He noted that Georgia-Pacific had been used and misused by experts and that the Federal Circuit had adapted the law to deal with small inventions (e.g. where there were many patents within a single device). The new rules meant that apportionment was always required, real world comparability was appropriate and the importance of Georgia-Pacific was reduced.

Tina Chappell noted that patent systems were an invention to speed up the developments of other inventions. All patent systems have common routes but today's inventions are different – stemming from multi-disciplinary teams working on different aspects of projects. So as inventions have changed, the law must evolve. This means that proportionality is more key than ever. High-tech products will be covered by potentially thousands of patents which means that remedies must be re-calibrated. Injunctions may be appropriate but will not always be merited. Usually it will be appropriate to consider the value contributed by the infringed patent when assessing damages. The three factors set out by the Federal Circuit Bar Association's New Model Patent Jury Instructions allow a fair assessment of the reasonable royalty.

There will be a further report on Day 2 of the conference, the agenda for which looks more European in scope.

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